In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST CO., A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73

FIRST SECURITY BANK OF UTAH, N.A., PETITIONER

v.

COMMERCIAL SECURITY BANK

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE COMPTROLLER OF THE CURRENCY

We comment briefly here on the argument of respondent in No. 51 (the *Logan* case) that 12 U.S.C. 36(c), which authorizes the establishment of branch

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banks by national banks where branch-banking is authorized by State law to State banks, has application only to branches established by the opening of a new facility (a *de novo* branch) and not to branches resulting from the acquisition of an existing bank (Br. 11). Respondent contends that the section applicable to branching by merger in Section 36(b)(2).[1] We have difficulty in understanding the relevance of this contention to the issues in this case, since that section, so far as is relevant here, expressly incorporates the standards of Section 36(c). See 12 U.S.C. 36(b)(2)(A) (note 1). At all events, the history of Section 36(b)(2) makes clear that it was not intended to limit the Comptroller's authority under Section 36(c) to authorize *de novo* branching in States like Utah which freely authorize branch banking but provide that a branch may be established only by taking over an existing bank.

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[1] 12 U.S.C. 36(b)(2) provides:

> A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—
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> (A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;
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> (B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or
>
> (C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch

The McFadden Act (1927) distinguished between branches that were in operation at the time of its enactment and "new branches"—*i.e.*, those subsequently established. Section 7 of that Act, codified in 12 U.S.C. 36, made no distinction between branches established after 1927 by taking over existing banks and branches established by creating new facilities. Section 7 provided that a national bank could "retain and operate" any branch that was in lawful operation on February 25, 1927, whether on that date the branch was a branch of a State or of a national bank (44 Stat. 1228, 12 U.S.C. (1958 ed.) 36 (a) and (b)); branches established after that date were "new branches" within the meaning of Section 36(c)—whether they were established by setting up new facilities or by taking over an existing branch or bank. Thus, if a national bank took over another bank by acquisition or merger, the national bank could retain and operate that bank as a branch only if it could be established and operated as a "new" branch under 36(c). S. Rep. No. 2040, 87th Cong., 2d Sess.

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of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

In 1962 Congress amended the statute. 76 Stat. 667 (Sept. 28, 1962), 12 U.S.C. 36(b). The amendment was designed simply to permit the retention of branches of acquired banks when the branch was established after 1927, and was lawful when established, but because of changes in State law could not at the time of conversion or merger be established as a new branch under 36(c). In other words, it permitted national banks in the acquisition of State banks to take advantage of State grandfather clauses respecting the continued operation of branches whether the branch was established before or after February 25, 1927. S. Rep. No. 2040, *supra*. With respect to the establishment of branches by taking over existing banks, the amendment merely restated existing law by providing that a bank taken over by acquisition or merger could be retained as a branch if, under 12 U.S.C. 36(c), "it might be established as a new branch." 12 U.S.C. 36(b)(2)(A) (note 1, *supra*). Thus, the establishment of a branch by taking over an existing bank is still treated as the establishment of a "new" branch within the meaning, and subject to the criteria, of 12 U.S.C. 36(c); and the criteria for the establishment of "new branches" of national banks have always applied alike to branches established after February 25, 1927, whether they were established by taking over existing banks or by creating wholly new facilities.

Accordingly, it is clear that the phrase "new branches" in 12 U.S.C. 36(c) encompasses branches established after 1927 both by taking over existing

banks and by establishing new facilities. And, therefore, within the meaning of 12 U.S.C. 36(c), Utah law "expressly authorized" State banks to establish "new branches" at the time of the establishment of the branches challenged here, albeit it required that any new branch be established by acquisition of an existing bank.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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